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No. 87-492

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES W. COLLYER, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner voluntarily consented to a search of his person and automobile.

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OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 24 M.J. 454. The order of the Air Force Court of Military Review (Pet. App. 2a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on July 28, 1987. The petition for a writ of certiorari was filed on September 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial before a military judge at the Royal Air Force Base at Lakenheath, England, petitioner, a member of the United States Air Force, was convicted of violating a lawful general regula-

tion, making false official statements, larceny, forgery, and uttering a worthless check, in violation of Articles 92, 107, 121, 123, and 123a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892, 907, 921, 923, and 923a. He was sentenced to five years' confinement, a dishonorable discharge, and ancillary penalties. The convening authority dismissed one of the forgery counts and reduced the sentence to confinement for four years, nine months, but he approved the findings and sentence in all other respects. The Air Force Court of Military Review summarily affirmed the findings and sentence (Pet. App. 2a). The Court of Military Appeals also summarily affirmed (*id.* at 1a).

1. On the morning of November 6, 1984, the Air Force Office of Special Investigations (OSI) at the Lakenheath Base began an investigation into whether petitioner had been maintaining checking accounts with the American Express International Banking Corporation (AMEXCO) under the aliases James J. Coll and James J. Colby in addition to his own name, and whether petitioner had used those accounts to obtain a bank loan and to utter several worthless checks in the amount of $500 each (Tr. 37-38, 40). An initial comparison of the handwriting on several bank drafts written on those accounts indicated that they were written by the same person (Tr. 37-40). That afternoon, petitioner was located and brought to the Lakenheath OSI offices for questioning (Tr. 40, 55). Before petitioner was questioned, Special Agent Nathanael Lukens, the investigator in charge of the case, received a telephone call from Major Terence Curtin, the local area defense counsel (Tr. 40-41). Major Curtin advised Agent Lukens that he represented petitioner with respect to the investigation, and that he had already spoken with petitioner that day. Major Curtin also asked to speak with petitioner (*ibid.*). Petitioner then conferred privately with Major Curtin for several minutes on the telephone (Tr. 41). At

the end of their conversation, Agent Lukens again spoke with Major Curtin. Major Curtin told the agent that petitioner "wasn't going to answer questions or be interviewed" and that petitioner "had nothing to say" (*ibid.*). Major Curtin also said that he wanted to see petitioner (*ibid.*).

Agent Lukens did not thereafter question petitioner about the suspected offenses. The agent told petitioner that he was represented by Major Curtin and that Major Curtin wished to see him (Tr. 42). Before allowing petitioner to go to Major Curtin's office, however, the agent asked petitioner if he would consent to a search of his person, his automobile, and his residence (*ibid.*). Agent Lukens told petitioner that he had the right to refuse consent, and he read petitioner a consent-to-search form that disclosed petitioner's rights, the areas to be searched, the purpose of the search, and the consequences if evidence were found (Tr. 42, 58-59, 61-63; AX 11).[1] Petitioner consented to a search of his person and automobile and signed the consent form, but he declined to consent to a search of his residence (Tr. 40, 42, 59; see AX 11).

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[1] The form stated in relevant part (AX 11 (footnotes omitted)):

> I, [petitioner], state that SA Nathanael G. Lukens was identified to me as a special agent AFOSI and advised me that the nature of the offense(s) of which I am suspected (matters concerning which I may have knowledge) is/are as follows:
>
> [handwritten by SA Lukens and initialed by petitioner] Larceny by fraud, obtaining monies by deceiption [*sic*], bad/worthless checks, obtaining loans under fraudulent pretenses
>
> I know that I have an absolute right to give my consent to a search. I understand that, if I do consent to a search, anything found in the search can be used against me in a criminal trial or in any other disciplinary or administrative procedure. I also understand that, if I do not consent, a search cannot be made without a warrant or other authorization recognized in law.
>
> With knowledge of the foregoing, I have decided to allow the person identified above and whomever may be designated to assist

The search of petitioner's person turned up a letter from AMEXCO advising petitioner that his account was being closed because of bad checks, $500 in cash, check guarantee cards, a small photograph typically used on military identification cards, and a book of gasoline ration coupons (Tr. 42-43). Agent Lukens then placed petitioner under apprehension (Tr. 43).[2] A search authorization for petitioner's car and residence was later obtained from the base commander (Tr. 44; AX 10).[3] Agent Lukens, along with other OSI agents and local civilian authorities, searched petitioner's residence that day, and seized various items of evidence, including a "chartpak" electronic marking kit, stencils in the name of James J. Colby (one of petitioner's suspected aliases), and a letter from a fur company indicating that a debt of 4,795 pounds Ster-

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to search the following place(s)/thing(s) in the daytime or night time:

[handwritten by SA Lukens and initialed by petitioner] Person, duty Section, privately owned vehicle, 77 Toyota AAD 9355

Before deciding to give my consent, I carefully considered this matter. I am giving my consent voluntarily and of my own free will, without having been subjected to any coercion, unlawful influence or unlawful inducement and without any promise of reward, benefit, or immunity having been made to me. The investigators have my permission to take any letters, papers, materials, articles or other property they consider to be evidence of an offense, including contraband for use as evidence in any criminal prosecution hereafter initiated. I have read and understand this entire acknowledgement of my rights and grant of my consent for search and seizure.

[2] "Apprehension" is the military term for arrest, and occurs when a person is taken into custody. Art. 7(a), UCMJ, 10 U.S.C. 807(a).

[3] A search authorization is the military equivalent of a search warrant. It may only be issued upon probable cause by an impartial commander, a military judge, or a military magistrate empowered by regulation to issue search authorizations. Mil. R. Evid. 315(d). Petitioner does not dispute that the base commander could authorize a search.

ling, originally paid by a check dated October 13, 1984, had subsequently been paid in cash on October 26, 1984 (Tr. 45-46; AX 11). A subsequent search of petitioner's car turned up $1,500 in cash, a checkbook, and an application for a new checking account in petitioner's name (Tr. 48-49).

2. Before entering his plea, petitioner moved to suppress the evidence that was obtained as a result of the search of his person, his car, and his residence. Petitioner claimed that his consent to the searches was involuntary because it was obtained in violation of his Sixth Amendment right to counsel (AX 3; Tr. 22, 95-96).[4] After an evidentiary hearing,[5] the trial judge found that petitioner's consent to search was voluntary and denied the suppression motion (Tr. 106). The Court of Military Appeals summarily affirmed on the basis of its decision in *United States* v. *Roa,* 24 M.J. 297 (1987) (Pet. App. 1a).[6]

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[4] Petitioner also claimed that the request for his consent to the searches violated the rule stated in *United States* v. *McOmber,* 1 M.J. 380 (C.M.A. 1976), which requires investigators who know or should know that a suspect is represented by counsel to notify counsel before questioning the suspect. A failure to comply with the rule renders any statement obtained thereby involuntary. See Mil. R. Evid. 305(e). *McOmber* was not decided on constitutional grounds. *McOmber,* 1 M.J. at 82-83; *United States* v. *Harris,* 7 M.J. 154, 156 (C.M.A. 1979). Petitioner does not reassert that claim in this Court.

[5] Petitioner did not testify at the hearing. The only witness who testified on this issue was Agent Lukens.

[6] *Roa* produced three separate opinions. Judge Cox determined (Pet. App. 5a-7a) that asking a suspect in custody for consent to search did not implicate the Fifth Amendment privilege against compulsory self-incrimination, because the request involved only nontestimonial evidence, as to which the privilege does not apply. See *Schmerber* v. *California,* 384 U.S. 757 (1966). The request for consent also did not implicate the Sixth Amendment, Judge Cox wrote, since adversary criminal proceedings had not yet begun (Pet. App. 7a-8a). Accordingly, Judge Cox concluded that the voluntariness of a person's consent must be tested under the totality of the circum-

ARGUMENT

Petitioner contends that his consent to search his person and car was involuntary, because it was obtained in violation of his attorney's instruction to the investigator not to question petitioner about the suspected offenses. Petitioner has waived that claim, however. In any event, petitioner's claim—which attempts to combine the Fifth Amendment privilege against compulsory self-incrimination and the Sixth Amendment right to counsel with the Fourth Amendment protection against unreasonable searches and seizures—finds no support in the decisions of this Court.

Petitioner has presented the question (Pet. i) whether the agent's request for his consent to the searches violated his Fifth Amendment privilege against compulsory self-incrimination. Petitioner's argument also rests primarily on this Court's decisions in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and its offspring, particularly *Edwards* v. *Arizona,* 451 U.S. 477 (1981). Petitioner, however, has clearly waived any such claim. The military rules of criminal procedure require that suppression claims be raised before the defendant enters his plea. The failure to assert a suppression claim in a timely manner amounts to a waiver of the claim absent "good cause" for the default. Rules for Courts-Martial 905(b)(3) and 905(e), *Manual for Courts-Martial, United States—1984*; Mil. R. Evid. 103(a)(1), 311(a)(1), and 311(d)(2)(A). Petitioner did not

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stances, as required by *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973) (Pet. App. 9a). Chief Judge Everett concluded that asking a suspect to consent to a search does not amount to "interrogation" unless the suspect is also asked to identify the property subject to the search (*id.* at 10a-11a). Judge Sullivan concluded that a request for consent to a search violates *Edwards* v. *Arizona,* 451 U.S. 477 (1981), which he interpreted as prohibiting all communications initiated by the police after a suspect has invoked his right to counsel (Pet. App. 13a).

rely on either the Fifth Amendment or *Miranda* in his suppression motion (AX 3; Tr. 95-96), and he does not maintain in his petition that there was good cause for his failure to do so. Petitioner has therefore failed to preserve either claim.

Petitioner also claims (Pet. i) that his consent was involuntary under the Fourth Amendment. Petitioner also did not rely on the Fourth Amendment at trial, however, and he has therefore waived that claim as well.

In any event, petitioner's consent was valid under well-settled Fourth Amendment principles. The validity of a person's consent to search is a question of fact to be determined on the basis of the totality of circumstances. *United States* v. *Mendenhall,* 446 U.S. 544, 557 (1980); *United States* v. *Watson,* 423 U.S. 411, 424 (1976); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 227 (1973). In this case, the trial judge found that petitioner's consent was voluntary, and the evidence clearly supports that finding.[7] Neither of the military appellate courts disturbed the trial court's

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[7] None of the earmarks of coercion is present in this case. Petitioner was a non-commissioned officer in the Air Force with considerable training and experience (see PX 34 (Airman Performance Reports from 1973 to 1984)). He was 37 years of age and college educated (see AF Form 65 (Transmittal of Court-Martial Charges, allied papers, ROT)). Petitioner was not subjected to any form of physical or psychological coercion, actual or implied, nor was he given any promises or inducements to consent. Petitioner was specifically advised of his right to refuse consent, both orally and in writing, which is a factor that weighs heavily in favor of the determination that his consent was voluntary. *Mendenhall,* 446 U.S. at 558-559 (opinion of Stewart, J.). Petitioner gave his consent immediately after speaking with his attorney on the telephone, and he presumably would have been free to contact his attorney again regarding the request for his consent to search, if he had wished to do so. Finally, petitioner withheld his consent to a search of his residence, which shows that he was both aware of and able to exercise his right to refuse consent. These facts demonstrate that petitioner's consent was not only voluntary, but also knowing and intelligent.

finding, and it does not warrant further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 7-8; *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984).

Petitioner contends that a custodial request for consent to a search is sufficiently analogous to a custodial interrogation that this Court should extend the rule of *Edwards* v. *Arizona*, *supra*, and *Brewer* v. *Williams*, 430 U.S. 387 (1977), to render involuntary any consent to search that is given in a custodial setting once a suspect is represented by counsel. That claim lacks merit.

Edwards does not support petitioner's claim, for several reasons. To begin with, petitioner has not shown that he was "in custody" for purposes of *Miranda* when Agent Lukens asked him to consent to the searches.[8] The fact that petitioner was at OSI headquarters when he was asked for his consent is not dispositive, since a person who is questioned at a police station is not necessarily "in custody" under *Miranda*. *California* v. *Beheler*, 463 U.S. 1121 (1983) (suspect questioned at a police station held not "in custody" under *Miranda*); *Oregon* v. *Mathiason*, 429

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[8] The trial judge made no finding on this issue, since petitioner did not object to the searches on *Miranda* grounds. In any event, it is hardly clear from the record that petitioner was "in custody" for *Miranda* purposes when he gave his consent. Petitioner was escorted to OSI headquarters by two OSI agents (Tr. 40), but the record does not reveal whether petitioner was ordered to accompany the agents or voluntarily accompanied them. Although Agent Lukens testified that petitioner was not free to leave at some point during the time that he was at the OSI headquarters (Tr. 56), the agent also testified that he was planning to release petitioner to see Major Curtin immediately after he asked petitioner for consent to a search of his person and car. He decided to arrest petitioner, however, once the search of petitioner revealed evidence connecting him with the suspected offenses (Tr. 42, 43). The agent's subjective intent is also not dispositive of this question. *Berkemer* v. *McCarty*, 468 U.S. 420, 442 & n.35 (1984). Petitioner has therefore failed to establish the predicate for his reliance on *Miranda*.

U.S. 492 (1977) (same).[9] Petitioner also did not ask to speak with Major Curtin while he was at OSI headquarters. Accordingly, the rule adopted in *Edwards* that a suspect may not be interrogated in the absence of counsel once he asks to speak with an attorney (451 U.S. at 485) does not apply here, even assuming that the agent's request for petitioner's consent amounts to an "interrogation." But cf. *Rhode Island* v. *Innis,* 446 U.S. 291, 301 & n.5 (1980) (referring to "statements" in defining "interrogation"). In addition, *Miranda* does not forbid police interrogation of a person who has not invoked his right to counsel even if his attorney attempts to speak with him. *Moran* v. *Burbine,* 475 U.S. 412, 421-428 (1986). As the Court made clear in *Moran* v. *Burbine,* 475 U.S. at 425, "a rule that focuses on how the police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—would ignore both *Miranda*'s mission and its only source of legitimacy." Finally, a violation of *Miranda* would not require that the physical evidence seized by the OSI agents be suppressed at petitioner's trial. *New York* v. *Quarles,* 467 U.S. 649, 665-672 (1984) (opinion of O'Connor, J.).[10]

Petitioner's reliance on *Brewer* v. *Williams, supra,* is also misplaced. *Brewer* ordered the suppression of a defendant's confession that was obtained in violation of his Sixth Amendment right to counsel. A defendant's right to counsel attaches only after adversary criminal proceed-

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[9] In any event, even if petitioner was is in custody when he consented, that fact does not render his consent involuntary as a matter of law and is simply one factor to be considered in determining whether his consent was voluntary. *United States* v. *Watson,* 423 U.S. 411, 424 (1976).

[10] Petitioner's act of giving consent was not a "testimonial communication" of the type protected by the Fifth Amendment. Cf. *Washington* v. *Chrisman,* 455 U.S. 1, 6 n.3 (1982).

ings have been initiated against him. *Moran* v. *Burbine,* 475 U.S. at 428; *United States* v. *Gouveia,* 467 U.S. 180, 187 (1984). In the military, a defendant's right to counsel does not attach until the preferral of formal charges (*United States* v. *Wattenbarger,* 21 M.J. 41, 43 (C.M.A. 1985), cert. denied, 477 U.S. 904 (1986)), and no formal charges had been preferred against petitioner when Agent Lukens asked petitioner for his consent. *Brewer* therefore does not aid petitioner.

Taken in its most favorable light, petitioner's argument is no stronger than the one that this Court rejected in *Moran* v. *Burbine, supra.* There, the police interrogated a suspect after informing an attorney retained by a member of the suspect's family that the suspect would not be questioned in counsel's absence. This Court held that the confession subsequently obtained by the police was admissible at trial, and it rejected claims that the interrogation of the suspect violated *Miranda* and the Sixth Amendment. 475 U.S. at 421-432. *Moran* therefore makes clear that the proper focus is on the actions the police take towards a suspect, not the actions they take with respect to his counsel. In fact, petitioner was in an even more favorable position than the suspect in *Moran,* since petitioner had an attorney, had already spoken with him, and could have asked to speak with him again about consenting to the searches.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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